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N (f) v C

HIGH COURT (KUALA LUMPUR) — JUDICIAL SEPARATION PETITION NO S5-33-957 OF 1996
JAMES FOONG J
7 OCTOBER 1997

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Family Law *— Matrimonial property — Division of property — Whether a gift acquired during marriage to one spouse only was subject to division — Whether repayment of loan used to acquire property had directly or indirectly deprived petitioner of certain benefit — Whether petitioner had contributed to the household maintenance — Whether petitioner was entitled to a portion of the property — Law Reform (Marriage and*
C *Divorce) Act 1976 s 76*

The husband ('the respondent') and the wife ('the petitioner') were married in 1979. The petitioner moved out of the matrimonial home in October 1987 and was granted a decree for judicial separation in
D June 1997. The court had earlier granted the petitioner guardianship and maintenance of their children. The contentious issue before the court was regarding the petitioner's claim for a portion of the matrimonial home ('the house') — purchased before their marriage — which was originally registered in the names of both the respondent and his mother in equal share. The undivided ½ share of the mother
E was transferred to the respondent in 1986 upon her death. The other undivided ½ share originally registered in the respondent's name was purchased from a housing loan and a monthly repayment of RM400 was made by the respondent during their marriage.

The petitioner alleged that she had contributed RM15,000
F towards the purchase of the house and further claimed that she had paid for the household expenditure during the period they were residing in the house. By virtue of these contributions, she insisted that she was entitled to a portion of the house. The respondent, however claimed that the house was bought entirely by his mother and that it was a gift from his mother, thereby not falling within the
G ambit of s 76 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act').

Held:

(1) The undivided ½ share of the matrimonial asset derived from the
H respondent's deceased mother which was transmitted to the respondent in 1986 was not subject to division. The ½ share was a gift from the deceased mother rather than an asset acquired by both the petitioner and the respondent through joint effort in the form of money, property or work. A gift — even though acquired during the marriage — to one spouse only does not fall within
I the meaning of s 76 of the Act. Thus, the petitioner's claim for this particular portion must fail (see pp 858I and 859A).

(2) On the facts, it was clear that the petitioner had contributed towards the acquisition of the other undivided ½ share originally registered in the respondent's name. By the monthly loan

repayment, the respondent had directly or indirectly deprived the petitioner of the benefit of that amount of money. Further, the petitioner with her own income would have incurred household expenses for the family, thus contributing to the household maintenance. Thus, the petitioner was given the entitlement of half of that undivided ½ share of the house, which would eventually be an undivided ¼ share of the property.

However, there was no evidence to justify the claim that the petitioner had paid RM15,000 towards the house (see pp 859D–I and 860A); *Ching Seng Woah v Lim Shook Lin* [1997] 1 MLJ 109 followed.

[Bahasa Malaysia summary

Si suami ('penentang') dan si isteri ('pempetisyen') telah berkahwin pada tahun 1979. Pempetisyen telah berpindah keluar kediaman suami isteri pada bulan Oktober 1987 dan diberikan dekri pemisahan kehakiman pada bulan Jun 1997. Terdahulu, mahkamah telah memberikan jagaan dan penangguhan anak-anak kepada pempetisyen. Isu yang dipertikaikan di hadapan mahkamah adalah berhubung dengan tuntutan pempetisyen untuk sebahagian daripada kediaman suami isteri ('rumah tersebut') — yang dibeli sebelum perkahwinan — yang asalnya didaftarkan atas nama kedua-dua penentang dan ibunya dalam bahagian yang sama rata. Bahagian ibu sebanyak ½ yang tidak dibahagikan telah dipindah kepada penentang pada tahun 1986 apabila meninggalkan dunia. Bahagian ½ yang satu lagi yang asalnya didaftarkan dalam nama penentang dibeli daripada suatu pinjaman perumahan dan pembayaran balik bulanan sebanyak RM400 telah dibuat oleh penentang sewaktu perkahwinan mereka.

Pempetisyen mengatakan bahawa dia telah menyumbang RM15,000 terhadap pembelian rumah tersebut dan selanjutnya mengatakan bahawa dia telah membayar untuk pembelanjaan rumah sewaktu mereka menetap di rumah tersebut. Disebabkan sumbangan-sumbangan ini, dia menegaskan bahawa dia berhak mendapatkan sebahagian daripada rumah tersebut. Namun demikian, penentang menuntut bahawa rumah tersebut telah dibeli sepenuhnya oleh ibunya dan bahawa ia adalah suatu hadiah dari ibunya, maka ia tidak diliputi oleh lingkungan s 76 Akta Membaharui Undang-undang (Perkahwinan dan Perceraian) 1976 ('Akta tersebut').

Diputuskan:

(1) Bahagian ½ dalam aset suami isteri yang tidak dibahagikan diperolehi daripada ibu penentang yang telah meninggal yang dipindah kepada penentang pada tahun 1986 tidak tertakluk kepada pembahagian. Bahagian ½ adalah hadiah daripada mendiang ibu penentang bukannya aset yang diperolehi oleh pempetisyen dan penentang melalui usaha sama dalam bentuk wang, harta atau kerja. Suatu hadiah — meskipun telah diperolehi semasa perkahwinan — kepada suami atau isteri sahaja tidak

jatuh dalam lingkungan maksud s 76 Akta tersebut. Justeru itu, tuntutan pempetisyen untuk bahagian khas ini mesti gagal (lihat ms 858I dan 859A).

(2) Atas fakta-fakta, adalah jelas bahawa pempetisyen telah menyumbang kepada pemerolehan satu lagi ½ bahagian yang tidak dibahagikan yang asalnya didaftarkan dalam nama penentang. Dengan bayaran balik bulanan pinjaman, secara langsung atau tidak langsung penentang telah melucutkan pempetisyen daripada manfaat jumlah wang itu. Selanjutnya, pempetisyen dengan pendapatan sendiri sesungguhnya telah menanggung perbelanjaan rumah untuk keluarga, justeru itu menyumbang kepada penyenggaraan rumah. Oleh itu, pempetisyen diberikan hak kepada setengah bahagian ½ yang tidak dibahagikan dalam rumah tersebut, yang akhirnya adalah ¼ bahagian harta tersebut.

Walau bagaimanapun, tiada keterangan bagi menjustifikasikan tuntutan bahawa pempetisyen telah membayar RM15,000 terhadap rumah tersebut (lihat ms 859D–I dan 860A); *Ching Seng Woah v Lim Shook Lin* [1997] 1 MLJ 109 diikut.]

Notes

For cases on division of property, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 2133–2157.

Case referred to

Ching Seng Woah v Lim Shook Lin [1997] 1 MLJ 109 (folld)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 s 76

Mohan Singh (*KL Rekhraj*) for the petitioner.
MP Raja (*MP Raja ET Low & Tan*) for the respondent.

James Foong J: The petitioner is a nurse attached to a private hospital. The respondent is a medical doctor having his own private practice.

In January 1979, they got married by way of a civil marriage. On 2 December 1981 the first child, a girl, was born. This was followed four years later by a boy on 27 March 1985.

In October 1987, the petitioner moved out of the matrimonial home, No 40, Jalan Lemak, Taman Segar, Cheras, Kuala Lumpur ('house No 40') and went to stay with her father in a flat known as the 'Blue Boy Mansion'. To date, she still resides there with the two children. The reason for the move, as alleged by her, was that the respondent had formed a homosexual relationship with one of his ex-patients. This, of course, is denied by the respondent.

On 19 November 1996, a petition for judicial separation was filed by the petitioner to my court. Also claimed therein were:

(a) guardianship of the two children; A

(b) maintenance of RM4,800 per month for the two children;

(c) that the matrimonial home, house No 40, be transferred to her and/or be sold to the highest bidder with the proceeds to be apportioned as the court deems fit; and

(d) costs. B

On 16 June 1997, by consent of the parties, I granted a decree for judicial separation and guardianship of the two children to the petitioner. The issues on the maintenance and division of the matrimonial assets were adjourned to another date, to be heard in chambers.

I heard these matters in chambers on 12 August 1997. I managed to C secure the consent of the parties to agree on the maintenance for the children to be RM3,000 per month to commence from the month of September 1997.

With regard to the matrimonial assets, the matter remains contested. With this, it becomes necessary for me to give some information extracted D from either the cause papers or statements made to me by the parties and their counsel during submissions.

The only matrimonial assets claimed by the petitioner is house No 40. This is a dwelling house purchased on 16 September 1979. It was registered in the names of two persons in equal share — the respondent E and his mother. According to the respondent, this property was bought entirely by his mother who entered his name as proprietor for an undivided ½ share. Since the death of his mother, his mother's undivided ½ share was transferred to him in 1986. Under such circumstances, the respondent argued that this property was a gift from his mother, thereby not falling F within the ambit of s 76 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'). For this, the petitioner's claim for the matrimonial asset must fail.

The petitioner submitted that she had contributed RM15,000 towards the purchase of house No 40. In addition, she claimed that she had paid for the household expenditure during the period they were residing in the G matrimonial home. By virtue of these contributions, she insisted on an entitlement to the property, particularly since she would need to care for her growing children.

The respondent denied these claims. He emphasized that the petitioner never resided at house No 40 between 1979 and 1982. They made this H house their matrimonial home only in 1983, and even then, all the household expenses were taken care of by his mother.

With such disclosures, one thing seems certain. The undivided ½ share of the property derived from the respondent's deceased mother which was transmitted to the respondent in 1986 is not subject to division. It falls I outside the confines of s 76(1) of the Act. It is not an asset acquired by the petitioner and the respondent by their joint effort in the form of money, property or work towards its acquisition. It was a gift by the respondent's deceased mother to her son. On this, I am in agreement with the textbook

A authors that a gift even acquired during the marriage to only one spouse should be excluded: see *Matrimonial Law in Singapore and Malaysia* by Tan Cheng Han; *Law and the Family* by John Dewar and *Conflicts Issues in Family and Succession Law* by Tan Yock Lin.

This leaves us with the other undivided ½ share registered in the B name of the respondent from the time of the purchase. Here, we have conflicting evidence — the petitioner's assertion of having paid RM15,000 towards it, coupled with the household contribution, against the respondent's denial of such claim while insisting that his mother paid for both the house and the household expenses. The latter's protests, if true, would make the undivided ½ share a gift — which would, once again, be C excluded from division under s 76 of the Act.

Out of all these, one important fact comes to my attention. This was the housing loan of RM35,000 taken in 1981 to finance the purchase of this property. The respondent had repaid this loan. According to him, the repayment at RM400 per month was from his own income. He explained D that he had the ability to do so since he was already working. But one must not forget that during the period of repayment, he was also married and with children. By this repayment, in my opinion, he had directly or indirectly deprived the petitioner of certain benefits. For example, if not for the loan repayment, the sum of RM400 could be applied to benefit the petitioner. This can come in many instances, such as the application of E RM400 to engage a maid to carry out the household chores, or the purchase of home appliances to lessen domestic duties. Due to this, the petitioner had to make sacrifices and sacrifices must, in one way or another, be replaced by the effort of the petitioner who was the adult lady of the home physically capable of carrying out such tasks. For this effort, F consideration must be given and it must be transmitted as her contribution towards the acquisition of an undivided ½ share of the matrimonial home.

Closely associated with such effort would be, in my opinion, monetary expenditure for household expenses. The concept of marriage between a husband and wife is not only a union for the purpose of reproduction. It G is also for the parties to enjoy each other's companionship by staying together. With this, inevitably, even though there may be cases of strict agreements on financial arrangement, there will be many instances where the wife would have to incur her own money to make purchases for the house and family. A mother-in-law, as in this case, had taken care of the major household expenses, but I am certain, this cannot cover all necessities. H This is particularly so in the case of a working woman — as the petitioner was at the material time — where her pride and own income will often drive her to make some necessary purchases for the family. I cannot picture a wife making out a shopping list for her mother-in-law each time some items of need are required. For this, I believe that she must have contributed to the household maintenance. With the recent Court of I Appeal decision in *Ching Seng Woah v Lim Shook Lin* [1997] 1 MLJ 109, by which I am bound, this proposition is not without favour.

I am, however, unable to accept the petitioner's claim that she had paid RM15,000 towards the house. Except for this mere assertion, there is

no supporting evidence to justify this claim. I reminded myself that the entire property was only purchased for RM75,000 and a loan of RM35,000 was also obtained to finance it. RM15,000 therefore formed a significant part of the purchase price. If the petitioner had paid this substantial sum, why was her name not inserted instead of that of her mother-in-law and husband? I must bear in mind that the parties are Chinese. It is still the Chinese cultural tradition and practice to secure one's future first, particularly in land properties, rather than to allow even the husband — who, being a male, is more capable in fending for himself — or an acquired relative to be the registered owners.

Nevertheless, as I have ruled that the petitioner had contributed to the matrimonial home by both effort and household expenditure, the only issue which remains to be decided is what proportion in the division she is entitled. The debt due to Bank Bumiputra, I understand, had been repaid by the respondent. There are still two minor children of the marriage and they are residing with the petitioner in a small flat situated in the center of the city. The respondent resides by himself at house No 40. Having considered these factors as set down under s 76(2) of the Act, I find that the petitioner should be entitled to half of the undivided ½ share of the house. This effectively is an undivided ¼ share.

As it will not benefit the petitioner to be the registered proprietor of an undivided ¼ of the said property with the respondent still residing therein, I hereby order that the said property be sold within three months from the date of this order with a completion date of not later than four months thereafter. It can be sold by private treaty at the highest secured price based on a valuation report of M/s CH William Wong & Tahir on the current market price, with the respondent having a right to purchase. The estate agent's fees shall be borne from the proceeds of sale. The proceeds of sale after payment of all expenses shall then be apportioned on a 75%:25% basis with the petitioner receiving only 25% after deducting her portion of real property gains tax (if any). As the respondent is in possession of the document of title and is the registered owner, it will be upon him to carry out this sale.

I further order that by consent RM3,000 per month maintenance for the children from September 1997 be paid by the respondent to the petitioner.

As for costs, I order the respondent to pay costs for the petition and ancillary reliefs.

Order accordingly.

Reported by Jacob Ting